

[2022] PBSA 9

## Application for Set Aside by Muqtaay

### Application

1. This is an application by Muqtaay (the Applicant) to set aside the decision made by a Member Case Assessment (MCA) panel following a paper review dated 5 August 2022 to make no direction for release.
2. I have considered the application on the papers. These are the paper decision, the dossier, the written application to set aside dated 23 September 2022 and the submissions on behalf of the Secretary of State (the Respondent) dated 9 November 2022.
3. In both the application and reports from the Probation Service in the dossier, the Applicant is referred to as Muqtaar but I have used the name used on the referral from the Respondent and the Applicant's licence.

### Background

4. On 20 January 2021, the Applicant received a determinate sentence of 27 months' imprisonment in total following conviction for s20 wounding and threats to kill. His sentence expires on 17 March 2023.
5. The Applicant was aged 43 at the time of sentencing. He is now 45 years old.

### Application to Set Aside

6. The application to set aside is dated 23 September 2022 and has been drafted and submitted by the legal representative on behalf of the Applicant. There was a delay in this application being received which I will not go into as it is not relevant to the application.
7. The application to set aside is made on the basis there was an error of law or fact, specifically an error in the facts leading up to the Applicant's recall.
8. The Applicant submits that he was not aware of the licence condition, which he then breached, and therefore did not intend to breach his licence conditions. It is submitted that the decision by the MCA panel member was made on the basis of a "*malicious breach as opposed to an honest mistake*". Therefore the decision was made based on an error of fact.



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## Current Parole Review

9. The Applicant had been released automatically as is required by law on 28 January 2022. However, he did not physically leave custody until 20 May 2022 when he was released on immigration bail. His licence was revoked on 28 May 2022 and he was returned to custody two days later.
10. He had been recalled due to breaching one of his licence conditions, namely his curfew, and the circumstances that surrounded that breach.
11. The Applicant's case was referred to the Parole Board by the Respondent to consider whether it would be appropriate to direct his re-release following the revocation of his licence. His case was considered by an MCA panel who concluded that he did not meet the legal test for release and therefore made no direction for release. This was his first review by the Parole Board since his recall.

## The Relevant Law

12. Rule 28A(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that a prisoner or the Secretary of State may apply to the Parole Board to set aside certain final decisions. Similarly, also under the Rules, the Parole Board may seek to set aside certain final decisions on its own initiative.
13. The types of decisions eligible for set aside are set out in rules 28A(1). Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for set aside whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)).
14. A final decision may be set aside if it is in the interests of justice to do so (rule 28A(3)(a)) **and** if one or more of the conditions in rule 28A(4) are satisfied:
  - a) a direction for release (or a decision not to direct release) would not have been given or made but for an error of law or fact, or
  - b) a direction for release would not have been given if
    - (i) information that had not been available to Board had been available, or
    - (ii) a change in circumstances relating to the prisoner after the direction was given, had occurred before it was given.
15. Under Rule 28A(5) an application to set aside a decision must be made within 21 days of the decision if the grounds of challenge relate to there having been an error of law or fact.

## The Reply from the Respondent

16. The Secretary of State (the Respondent) provided a response which was drafted and submitted by the Public Protection Casework Section (PPCS) acting on his behalf.

The submissions set out the history of the Applicant's case including his conviction and the circumstances of the recall and highlights relevant aspects of the MCA panel's decision.

17. The Respondent submits that the decision made by the MCA panel should be upheld.

## Discussion

### *Eligibility*

18. The application concerns a panel's decision not to direct release following a paper review under rule 19(1)(a). The decision became final on 2 September 2022 following the expiry of 28 days during which the Applicant had the opportunity to apply for an oral hearing. The Applicant submitted his application on 23 September 2022 which was just in time as it had to be made within 21 days of the decision becoming final. It is therefore an eligible decision which falls within the scope of rule 28A.

### *Error of Law or Fact*

19. In order to set aside this decision, I have to be satisfied that it is in the interests of justice to do so.

20. I also have to be satisfied that there was an error of fact and also that the decision not to direct release of the Applicant would not have been made but for that error.

21. A panel of the Parole Board makes a decision based on the evidence in front of it. If further matters come to light, it will not render that decision mistaken as to fact. The Applicant had an opportunity to submit representations at the point his case was considered. Following the decision, he had 28 days in which to argue that he ought to have an oral hearing for him to put forward matters he has raised in his application. He did neither of those things. The provisions for setting aside are not an opportunity to have a 'second bite of the cherry' as it were.

22. I have carefully considered the Applicant's submissions. Much of what he argues is against the appropriateness of his recall and not the statutory test for release which the MCA panel was bound to apply.

23. The Applicant had already raised his lack of knowledge about his curfew at the time of his recall. This was noted by the panel in paragraph 2.3 of the decision. The panel was provided with a copy of the Applicant's licence which contained the relevant condition. The Applicant's Community Offender Manager (COM) detailed in their report that they had undertaken a home visit on 25 May 2022 (three days prior to the breach of curfew) and the Applicant confirmed he understood his licence and had no questions about it. The panel specifically concluded that the Applicant's explanation that he did not know about his curfew was not credible (paragraph 3.3).

24. Therefore, I am satisfied that the panel took into account the Applicant's account of the breach. Making a finding against him does not mean it was a mistake of fact.

The further detail he provided in his application does not render it a mistake of fact either.

25. It is also important to highlight that the breach of the curfew was not the only issue considered by the panel. The breach involved the Applicant leaving his designated accommodation 15 minutes after his curfew and returning 1.5 hours later. When he returned, he presented as intoxicated and an empty bottle of red wine was found in the wardrobe in his room. When he was drug tested the next day, he tested positive for cannabis. The panel had identified that drug and alcohol use were key areas of risk, as well as poor management of his emotions and his associates. The Applicant had been consuming alcohol before stabbing the female victim in the index offence. The Applicant told his COM in discussions following his recall that he was using alcohol and drugs to deal with stress and anxiety. He told his COM he had been out with friends on the evening he breached his licence and admitted he had prioritised his social life. The application for setting aside is silent as to the Applicant's use of substances whilst in the community so I can only assume that he does not dispute those allegations, accepts the drug test was accurate and maintains the position as already reported by his COM.

26. The panel concluded in paragraph 3.3 of its decision that the risk management plan would not be effective for a variety of reasons: his explanation about the curfew was not credible; he quickly resumed substance and alcohol misuse; he prioritised contact with associates over his licence; and he had not addressed his areas of risk. In the conclusion in paragraph 4.2 the panel also noted that the COM did not support re-release.

27. In light of the above, I am not satisfied that there was a mistake of fact and, even if there were, I am not satisfied that the decision would not have been made but for that supposed error. Given those conclusions, and taking into account all matters raised in the application, I am not satisfied that it is in the interests of justice to set aside this decision either.

## Decision

28. For the reasons I have given, the application is refused, and the decision of the panel dated 5 August 2022 remains final.

**Cassie Williams**  
**23 November 2022**